

ISSUE DATE: March 3, 1997

DOCKET NO. P-421/C-95-1036

ORDER DENYING PETITION FOR RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
Mac McCollar
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Formal Complaint of the
Members of MIPA Against U S WEST
Communications, Inc.

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RECONSIDERATION

PROCEDURAL HISTORY

On November 27, 1996, the Commission issued an Order addressing a complaint filed by the Minnesota Independent Payphone Association (MIPA) against U S WEST Communications, Inc. (USWC). In its Order, the Commission directed USWC to 1) continue offering the Public Access Line (PAL) service, 2) offer the lower-priced 1FB service to any COCOT provider requesting that service, and 3) unbundle certain services included in the PAL service. The Commission declined, however, MIPA's request to direct USWC to refund to affected MIPA members the difference between the amount paid for PAL service and what would have been paid if they were charged the 1FB rate. The Commission concluded that the refunds were not warranted.

On December 9, 1996, MIPA filed a Petition for Reconsideration of the Commission's decision on the refund issue.

On December 18, 1996, USWC filed a response to MIPA's petition.

On February 18, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. MIPA'S COMPLAINT

MIPA complained that despite Minn. Stat. §237.121 (5), which took effect August 1, 1995, USWC was refusing to provide 1FB (1-party, flat-rate business line) for resale by MIPA's members, private pay telephone companies.¹

¹ Pay telephone companies are also known as customer-owned, coin-operated telephone (COCOT) providers, customer-owned pay telephone providers (COPTs), and independent pay phone providers (IPPs).

MIPA requested that the Commission direct USWC to sell 1FB to MIPA members, remove all use of service restrictions in its tariffs except for those which prohibit residential service from being used as a different class of service, and pay refunds to MIPA members who have requested that their service be converted from PAL lines to 1FB lines. In addition, MIPA requested that the Commission refer the matter to the Attorney General's Office for civil and criminal proceedings against USWC and its officers.

II. THE QUESTIONED PORTION OF THE NOVEMBER 27, 1996 ORDER

In Section D of its November 27, 1996 Order, the Commission declined MIPA's request to direct USWC to refund to affected MIPA members the difference between the amount paid for PAL service and what would have been paid if they were charged the 1FB rate. The Commission concluded that the refunds were not warranted because

- during the period in question, USWC did in fact provide MIPA members (COCOT providers) with PAL service which is a superior service to 1FB;
- at least some of the MIPA members needed PAL service in order to provide adequate payphone service;
- the record does not establish which MIPA members used what portion of the PAL services provided;
- although USWC's position (that it was not required to sell 1FB to MIPA's members by Minn. Stat. § 237.121, Subd. 5) was not adopted by the Commission in the November 27, 1996 Order, it was not an unreasonable position; and
- the Company proceeded in good faith, in a way it viewed as consistent with a valid Commission Order of long-standing duration and application and tariffs adopted consistent with that Order.²

The Commission concluded that in the light of these circumstances it would be inequitable for all MIPA members to receive and to require USWC to refund the amounts as requested by MIPA. Order at page 6.

III. MIPA'S REQUEST FOR RECONSIDERATION

According to MIPA members, USWC improperly denied them subscriptions to 1FB service, a service to which were entitled since August 1, 1995. MIPA emphasized that in its Order, the Commission had interpreted Minn. Stat. §237.121, Subd. 5 as MIPA had requested and found that the statute did require USWC to provide 1FB service to COCOT providers for resale, just as MIPA members had claimed all along. MIPA argued that the Commission's interpretation

² See the Commission's 1984 Order in Docket No. P-421/C-82-4645 that allowed USWC to designate PAL as the exclusive class of service for COCOT use and resale.

of the law should apply from the date the statute went into effect, August 1, 1995, not from the date of the Commission's Order, November 27, 1996.

MIPA did not dispute the Commission's findings that all MIPA members received and some needed PAL services to provide adequate payphone service and that USWC acted in good faith when it refused sell 1FB to MIPA members. MIPA indicated that these factors were of no consequence. To MIPA, this case simply calls for enforcing the law (Minn. Stat. 237.121, Subd. 5) from the date the law became effective (August 1, 1995).

MIPA stressed that its petition simply calls for the proper enforcement of the statute. Proper enforcement of the statute, MIPA asserted, would include ordering USWC to refund the difference between the 1FB rates and the PAL rates to those members of MIPA who placed orders for 1FB service and who disputed their bills and paid the difference under protest and asked that the difference be placed in escrow.

IV. COMMISSION ANALYSIS

An issue in this matter on reconsideration is whether proper enforcement of Minn. Stat. § 237.121, Subd. 5 (1996) requires the refund of certain funds paid by MIPA members to USWC under protest, as requested by MIPA.

In its November 27, 1996 Order in this matter, the Commission determined that Minn. Stat. § 237.121, Subd. 5 requires USWC to sell one party flat rate business lines (1FBs) to COCOT owners who desires to use them for payphones. The Commission agrees with MIPA that such a finding is the equivalent of finding that the statute required that action as of the date it went into effect, August 1, 1995. It is clear that the law did not have one meaning from its effective date (August 1, 1995) to the issuance of the Commission's Order (November 27, 1996) and another meaning from that day forward.

Once the Commission found that USWC's action [refusal to sell one party flat rate business lines (1FBs) to COCOT owners who desires to use them for payphones] is contrary to statute, it was, of course, incumbent upon the Commission to prevent USWC's statutory violation. The Commission has done so. In its November 27, 1996 Order the Commission directed as follows:

Effective with this Order, USWC shall offer the 1FB service to any COCOT provider requesting that service. Ordering Paragraph 2, page 6.

Determination of what further remedial action, if any, should be taken with respect to the statutory violation identified is within the Commission's sound discretion, and is considered by the Commission based on the facts of the case. The enforcement statute (Minn. Stat. § 237.461, Subd. 1) states:

This chapter and the rules and orders of the commission adopted under this chapter **may** be enforced by any one or combination of: criminal prosecution, action to recover civil penalties, injunction, action to compel performance, and **other appropriate action**. [Emphasis added.]

The Commission notes that MIPA has abandoned its earlier request that the Commission refer this matter to the Attorney General for civil penalty proceedings for "knowing and intentional" statutory violations , perhaps in acceptance of the Commission's finding that USWC acted in good faith in this matter.³ MIPA has, however, continued to request another remedial action: refunds. The Commission finds that the particular remedial action requested by MIPA (refunds) is potentially classified as "other appropriate action." MIPA's request for refunds, therefore, is directed to the sound discretion of the Commission.

In its November 27, 1996 Order in this matter, the Commission explained why it felt that MIPA's refund proposal was not justified. Order at pages 5-6. The Commission's rationale is summarized in this Order, above at page 2. MIPA has presented no arguments upon reconsideration that persuade the Commission to reverse its judgment.

V. COMMISSION ACTION

It is the Commission's continuing view that it would be inequitable, in the circumstances of this case, to require USWC to make the refunds requested by MIPA. Accordingly, the Commission will deny MIPA's petition for reconsideration.

ORDER

1. The Petition for Reconsideration filed by Minnesota Payphone Association (MIPA) on December 9, 1996 is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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³ The Commission clarifies that MIPA's failure to press its initial request for penalty proceedings does not preclude the Commission from making such referral. The Commission has authority to make such a referral on its own motion and in appropriate circumstances would do so.